1980

Judy Baxter v. Thomas C. Stubbs, Frank Morton and Squaw Peak Inc. : Reply Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

JUDY BAXTER,

Plaintiff-Respondent

vs. Civil No. ~~52,265~~ 16842

THOMAS C. STUBBS, FRANK HORTON and SQUAW PEAK, INC.,

Defendants-Appellants.

REPLY BRIEF OF RESPONDENT

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STATEMENT OF NATURE OF CASE

Appellant appeals from the lower Court's determination that Respondent has a partnership interest in the Squaw Peak Inc. complex together with rights reflected in Plaintiff's Exhibit 2.

DISPOSITION OF CASE

The Trial Court awarded the Plaintiff a twenty-five (25) percent interest in a limited partnership involving all of the assets of Squaw Peak Inc. together with other rights as set forth in Plaintiff's Exhibit 2.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the lower Court's decision affirmed.

STATEMENT OF FACTS

Respondent will not re-state all of the facts pertinent to this case on appeal but will add facts omitted by Appellant and correct any mis-stated facts.

The Complaint in this case was filed August 10, 1979, and the trial was held November 15, 1979. Prior to the day of

trial Plaintiff had filed a motion for a continuance because the Defendant had failed to answer interrogatories or produce documents (See line 4 page 2 of the Transcript of Trial). The Court denied Plaintiff's motion and the matter was heard that day by the Court. The Plaintiff's motion for continuance, to compel answers to interrogatories and to produce documents are not contained in this record.

It is significant to note that Thomas C. Stubbs did not appear as a witness at the trial, even though he was the only Defendant with first-hand knowledge of the transaction involving the Plaintiff-Respondent. The trial judge had before him three documents (Plaintiff's Exhibits 1,2, and 3) together with other exhibits and the testimony of the Plaintiff. The testimony of the Plaintiff was uncontradicted and the defense relied entirely upon the defense of merger and failure of consideration to defeat the Plaintiff-Respondent's claim.

The statement by Appellant that the Plaintiff received $170,000.00 is an incorrect statement of fact (Transcript of Trial, page 13 line 26). The Respondent received $37,616.70 of the original $40,000.00 which was part of the $105,000.00 payable as per the Earnest Money Agreement. (Plaintiff's Exhibit 1)

Plaintiff testified that the selling price was $170,000.00, payable $40,000.00 cash, the assumption of the existing $65,000.00 mortgage and $65,000.00 payable as per Plaintiff's Exhibit 2. Plaintiff was to receive a one-fourth (1/4) interest in the Squaw Peak complex when developed and would retain the use of the home located on the property. The balance of the terms and conditions contained in Plaintiff's Exhibit 2 were to constitute the agreement between the parties. Stubbs and Horton were to pay off the $65,000.00 balance which was owing to Wasatch Bank of Pleasant Grove. With this understanding the Respondent Appellant executed a Warranty Deed to Squaw Peak Inc., a non-existent corporation.

The earnest money agreement was dated September 5, 1978 (Plaintiff's Exhibit 1), the amendment thereto was dated September 22, 1978 (Plaintiff's Exhibit 2) and the Warranty Deed from Plaintiff to Squaw Peak Inc. was dated November 1, 1978. (Plaintiff's Exhibit 3). It was the Plaintiff's contention that Plaintiff's Exhibits 1 and 2 constituted the agreement of the parties, and a partnership was to be established. (See item 1 of Plaintiff's Exhibit 2 "limited partnership is taking title"). However, Defendant Stubbs breached the agreement by

having the property deeded to Squaw Peak Inc., a non-existent corporation. (date of incorporation March 16, 1979, - See line 16, page 58 of the transcript of the trial). There is absolutely no evidence in the record of any consideration passing from Squaw Peak Inc. to Respondent - Judy Baxter.

POINT I

PLAINTIFF'S EXHIBITS 1,2 AND 4 WERE NOT MERGED INTO THE WARRANTY DEED.

Counsel for Appellant cites the Stubbs v. Hemmert case to support his merger theory. However, he recites only that portion of the language in the case that supports his position. At page 169 of the Stubbs v. Hemmert case the following language by our Supreme Court appears determinative of the question of merger in this case:

> "However, if the original contract calls for performance by the seller of some act collateral to conveyance of title, his obligations with respect thereto survive the deed and are not extinguished by it." 38 A.L.R. 2d 1131, Sec. 2.
>
> Further, the Court stated:
>
> "Whether the terms of the contract are collateral, or are part of the obligation to convey and therefore unenforceable after delivery of the deed, depends to a great extent on the interest of the parties with respect thereto."

In the case before the Court, the Respondent executed a Warranty Deed to Squaw Peak Inc., with the understanding that the terms of the Earnest Money Agreement and the addendum thereto, Plaintiff's Exhibits 1 and 2, would be fully complied with by Appellant-Stubbs. It is clear from Plaintiff-Respondent's testimony that she was to receive a one-fourth (1/4) interest in a partnership to be formed, together with the use of a red brick home located on the property. There were other terms and conditions as set forth in Plaintiff's Exhibit 2. The seller in this case met her obligation to convey by Warranty Deed, but the buyer seeks to defeat her claim by asserting the defense of "merger". Obviously, the terms and conditions found in Plaintiff's Exhibit 2 were separate and apart from the conveyance by deed and constituted the actual consideration for the conveyance.

The language found in 17 Am Jur 2d 483, p 953 supports Respondent's position: (my emphasis by underlining)

> "Also, as a minimum prerequisite to any correct holding that one contract has been merged in another by reason of the fact that several documents relating to the same subject were executed on the same date, there must be some reasonable basis for finding <u>that the parties so intented</u>."

The Appellant cites the Flinco Inc., v. Goodyear Tire and Rubber Company, case 17 Utah 2d 173, 406 P 2d 911 (19) for the proposition that the Plaintiff must show that a deed is not clear and ambiguous on its face, in order to overcome the doctrine of merger. Again, that case and the Rasmussen v. Olsen case, 583 P. 2d 5 (Utah 1978) apply only to situations where the deed in its execution and delivery constituted the final agreement between the parties. Clearly in this case, the buyer had agreed to terms and conditions which were separate and apart from the transfer by deed and actually constituted consideration by the buyer for the conveyance.

In responding to Points II, III and IV in Appellant's brief, the merger argument in Point II is answered by Respondent's argument to Point I. At page 7 of Appellant's brief the following underlined language clearly supports Appellant's argument:

> "The delivery and acceptance of a deed, executed pursuant to the provisions of a precedent contract for the sale of real property, may merge rights conferred by the contract into it. Stipulations in the prior contract, of which conveyance is not a performance, are superseded by the deed if the parties intended to surrender them."

Obviously, the Appellant wants a merger in this case since that would defeat the Plaintiff-Respondent's 25% interest in the Squaw Peak project, and the rights awarded to her by the

Court pursuant to the addendum agreement, Plaintiff's Exhibit 2. However, is there any evidence to support the Appellant's claim that the Plaintiff-Respondent intended to surrender her rights under the addendum agreement by executing the Warranty Deed? Apparently the District Court could find no evidence to support that proposition and ruled in favor of the Respondent.

The arguments made by Appellant in Point III and IV concerning consideration are without any merit whatsoever. The Plaintiff-Respondent executed a Warranty Deed, dated November, 1978, transferring real property to Squaw Peak Inc. In return, she received $37,616.70 cash, had a mortgage balance of $65,000.00 paid by an SBA loan, and was to receive the benefits referred to in Plaintiff's Exhibit 2, executed September 22, 1978. According to the record in this case the only failure of consideration was on the part of Squaw Peak Inc., a non-entity on November 1, 1978.

CONCLUSION

The District Court judgment should be upheld in all particulars and the Respondent should be awarded costs of this appeal.

Respectfully submitted,

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Attorney for Respondent

Certificate Of Mailing

I hereby certify that I mailed a true and correct copy of the foregoing to Thomas W. Seiler, Attorney for Appellant, 1325 South 800 East, Suite 310, Orem, Utah 84057, postage prepaid, this 10th day of March, 1980.

Matt Biljanic
MATT BILJANIC